IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 13TH DECEMBER 2007 / 22ND AGRAHAYANA 1929

RSA.No. 212 of 2005(A)

AGAINST THE JUDGMENT AND DECREE DATED 19.11.2004 IN AS.NO.166/2003 OF ADDL. DISTRICT COURT, NORTH PARAVUR OS.NO.274/2000 OF MUNSIFF'S COURT, ALUVA

APPELLANT: 2ND RESPNDENT: SECOND DEFENDANT:

N.SUGUNAN,
S/O.NARAYANAN, AGED 56,
ADDITIONAL DISTRICT JUDGE,
KOTTARAKKARA.

BY ADV. SRI.K.RAMACHANDRAN
SRI.P.RAMACHANDRAN

RESPONDENTS: APPELLANT & RESPONDENTS 1 & 3: PLAINTIFF & DEFENDANTS 1 & 3:

1. SRI.O.V.JOSEPH,
   AGED 65 YEARS, S/O.VAREED, OOKKEN HOUSE,
   ADVOCATE, ALUVA, ERNAKULAM DISTRICT.

2. KERALA STATE, REPRESENTED BY
   DISTRICT COLLECTOR, ERNAKULAM,
   COLLECTORATE, KAKKANAD P.O.

3. KERALA BAR COUNCIL REPRESENTED BY ITS SECRETARY,
   BAR COUNCIL OFFICE, KERALA BAR COUNCIL BUILDING,
   ERNAKULAM.

R3 BY ADV. SRI.T.A.SHAJI
SMT.T.V.NEEMA
R2 BY GOVERNMENT PLEADER SRI.DILEEP
R1 BY ADV. SRI.M.L.SAJEEV
SRI.M.N.SANJITH

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 13/12/2007, ALONG WITH FAO NO.308 OF 2004 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T.SANKARAN, J.

R.S.A. NO. 212 OF 2005

and

F.A.O.NO. 308 OF 2004

Dated this the 13th day of December, 2007

JUDGMENT

The Regular Second Appeal as well as the First Appeal against Order arise out of the same judgment and decree, dated 19.11.2004, in A.S.No.166 of 2003, on the file of the Court of the Additional District Judge, North Paravur. Since the appellate court has rendered a finding that the plaintiff is entitled to get damages and also that the second defendant is liable to pay the damages, by way of abundant caution, the appellant/second defendant has filed the Second Appeal though the appellate court had remanded the case to the trial court for fresh consideration in respect of quantum of damages. Since a remand was made, the appellant/second defendant has filed F.A.O.No. 308 of 2004. Notice was ordered on the substantial questions of law formulated in the Memorandum of Regular Second Appeal. The same questions of law as raised in the R.S.A. have been raised in the F.A.O. as well.

2. The appellant is the second defendant in O.S. 274 of 2000, on the file of the court of the Munsiff, Aluva, filed by the first respondent O.V.Joseph. Defendants 1 and 3 are State of Kerala and Bar Council of

Kerala respectively. The suit was filed by O.V. Joseph, who is an advocate practicing at Aluva and a member of the Aluva Bar Association, claiming a sum of Rs.One lakh as damages from the second defendant N. Sugunan, who at the relevant time was the Judicial Magistrate of the First Class. The compensation was claimed by the plaintiff on the ground that in the election to the Bar Council of Kerala held on 29.03.2000, he was denied his right to vote and the second defendant, who acted as the polling officer, was responsible for the denial of his right to vote . Though the Bar Council of Kerala was impleaded as party to the suit, there was no claim by the plaintiff against the Bar Council of Kerala and he has made it clear when he was examined as P.W.1

3. The case of the plaintiff is that he is a member of the Bar Association, Aluva. He was enrolled as an advocate in the year 1962. In the election to the Bar Council of Kerala, held on 29.03.2000, the second defendant was the polling officer. He was deputed as a polling officer on the basis of the request made by the Advocate General of Kerala to the Honourable Chief Justice of Kerala for deputing judicial officers all throughout the State to act as polling officers in the election to the Bar Council of Kerala. The second defendant at the relevant time was the Judicial Magistrate of the first class-II, Aluva. The plaintiff alleged in the plaint thus:

> "4. When the plaintiff came to the polling hall on 29.3.2000 at 10.30.a.m to cast his vote the second defendant polling officer refused to give him the Ballot Paper stating that the name of the plaintiff is not seen in the final list of members of Aluva Bar issued to him. When the plaintiff requested to the second defendant that the provisional list of members of Aluva Bar and the list of voters of Kerala Bar Council issued from the Bar Council office by the third defendant the name of the plaintiff is there with roll number as a member of Aluva Bar Association.

It is also stated in the plaint that the plaintiff requested the second defendant to verify the identity card issued to the plaintiff by the Bar Council of Kerala. The voters list contains all the relevant material particulars. It is admitted in the plaint that there is a mistake in the initials of the plaintiff as entered in the voters list and that instead of O.V. Joseph, his name was shown as C.V. Joseph in the voters list. It was further alleged that the second defendant committed a very grave dereliction of duty and thereby caused very serious mental pain and injury to the plaintiff. The plaintiff was insulted, humiliated , ridiculed and sent back by the second defendant in the presence of many senior and respectable members of the Bar. A sum of Rs. One lakh was claimed in the plaint for loss of reputation and mental pain. Paragraph 10 of the plaint reads as follows:

> "10. Plaintiff is legally entitled for damages of his loss of reputation and also his mental pain from the second and third defendants. Plaintiff calculate damages to the extent of Rs.1,00,000/- (Rupees One lakh) for his loss of reputation and mental pain. Both the second and third defendants are jointly and severally liable to pay Rupees One lakh as damage to the plaintiff:"

However, relief (a) in the plaint is the following:

> "a) Plaintiff prays for a decree for the sum of Rupees One lakh being damages with six percent interest from the date of suit till its realisation from the second defendant and his assets."

Relief (b) in the plaint is that the entire cost of the suit may be realised from the second defendant and if defendants 1 and 3 contest the suit, they also may be made liable for the cost.

4. In the written statement filed by the second defendant, it is stated that he was deputed as a polling officer by the Advocate General with the approval of the Honourable Chief Justice of Kerala. J.Vincent, Government Advocate, Aluva and Advocate Raphael Lazar were appointed as assistant polling officers. The name of the plaintiff was not there in the voters list. A polling officer has no authority to issue ballot paper to a person whose name is not included in the final voters list. The Bar Council of Kerala had prepared a preliminary voters list for the Bar Council election in accordance with the rules laid down in the Bar Council of India Rules and the preliminary list was published. The relevant portion of the preliminary voters list was sent to the Bar Associations concerned all throughout the State, calling for objections. Objections were to be filed within thirty days from the date of notification. The period for filing

objection was extended for a further period of fifteen days. The voters list was prepared after considering the objections and making necessary corrections. The corrected voters list was published by the Bar Council of Kerala and the relevant portion in respect of each Bar Association was sent to that Bar Association concerned. Again, time was granted up to 30.11.1999 to enable the members to file objections, if any, against the corrected voters list. After considering those objections as well, final voters list was published on 20.1.2000. The election was conducted on the basis of the final voters list.

5. The second defendant also contended that the name of the plaintiff was not included in the final voters list. On the other hand, name of one C.V.Joseph was available in the voters list. C.V.Joseph was no more on the date of election. The plaintiff did not file any objection within time so as to include his name in the final voters list. The question of verification of the identity card would arise only when identity of a voter whose name is in the voters list is challenged by the candidates or their agents. The second defendant had not committed any dereliction of duty cast on him. He discharged his duties with utmost care and in accordance with the directions of the authorities concerned. The plaintiff is not entitled to any of the reliefs claimed in the plaint.

6. Before the trial court, the plaintiff was examined as PW1. PW2 is an advocate who was practicing at Aluva Bar till 2001. PW1 stated in his proof affidavit, filed in lieu of chief examination, that the polling officer refused to give ballot paper to him stating that his name was not seen in the final list of members of Aluva Bar Association. It is further stated that he requested the second defendant to verify the voter identity card and to find out the correct identity of the voter. P.W 1 admitted that there was a mistake in his initials as shown in the voters list. The second defendant was acting under the guidance and directions of the third defendant and, therefore, the third defendant is vicariously liable. In cross examination, the suggestion put to PW1 is that his name was not included in the final electoral roll and that was why he was not allowed to vote. PW2 stated in evidence that the second defendant stated that the plaintiff could not vote as his name was not included in the electoral roll. PW2 categorically stated that the second defendant has not stated anything to the plaintiff to insult him. On behalf of the defendants, DWs.1 and 2 were examined. DW1, the Secretary of Aluva Bar Association, was examined to prove that C.V.Joseph, who was a member of Aluva Bar, expired on 12.11.1999. The Secretary of the Bar Council of Kerala was examined as DW2, who proved Ext.B6. Ext.B6 is a petition filed by the plaintiff and two others including his son, addressed to the Bar Council of Kerala as well as to the polling officer, stating that names of the plaintiff and two others were not

included in the electoral roll. Though a question was put to PW1 touching upon Ext.B6, he pretended ignorance.

7. The trial court dismissed the suit. It was held that Ext.B6 would indicate that the plaintiff did not make any attempt to satisfy the polling officer about his identity so as to overlook the mistake in the electoral roll. The contention of the plaintiff that the very refusal to issue ballot paper would constitute an insult to him entitling him to claim damages was negatived by the trial court. It was also held that there was no justification for the plaintiff to claim damages from the second defendant alone leaving out the third defendant. On the admitted and proved facts, the trial court held that the suit was filed by the plaintiff to harass the second defendant by dragging him to unnecessary litigation and that the second defendant had rightfully refused to issue ballot paper to the plaintiff. The trial court, on analysing the evidence, held that the plaintiff did not make any effort to satisfy his identity to the polling officer. Instead, he filed a petition stating that his name was not seen included in the final voters list.

8. The lower appellate court held that the plaintiff is entitled to get damages from the second defendant. However, the case was remanded to the trial court on the ground that from the available evidence, the court is not in a position to fix quantum of damages to be awarded to the

plaintiff. The appellate court held thus:

> ".. To award damages it requires some more evidence. For that purpose an opportunity has to be afforded to the appellants to adduce evidence regarding the quantum of damages to which he is entitled."

The lower appellate court reversed the finding of the trial court on the following grounds: (1) The finding of the trial court that there was no attempt on the part of the plaintiff to satisfy that Sl.No.505 in Ext.B5 electoral roll refers to him is incorrect. That finding is against the evidence adduced by the plaintiff. (2) Right to vote is a valuable right and denial of such right would amount to insult and humiliation. (3) The observation of the trial court that "mere refusal of ballot paper would not cause any insult or humiliation to a man of ordinary prudence is quite unfortunate". (4) From the evidence, it could be seen that the name of the appellant is included in Ext.B5 voters list. The difference in the initials was only a clerical or printing error which could be overlooked by the "presiding officer". (5) The plaintiff was denied his lawful right to cast his vote.

9. On considering the pleadings, documentary and oral evidence, the judgments of the courts below and the Memoranda of Appeals, the following substantial questions of law arise for consideration:

a) When the plaintiff himself admitted in Ext.B6 representation submitted by him to the Chairman, Bar Council of Kerala and the second defendant – polling officer that the name of the plaintiff was omitted to be included in the final voters list, can he maintain a suit for damages on the ground that he was denied the right to exercise franchise?

b) Was the court below justified in holding that the plaintiff has established the case, on the ground that the proof affidavit of the plaintiff filed by him in lieu of his chief examination contains necessary statements?

c) Is not the judgment of the court below vitiated due to failure to raise the points for determination as enjoined in Order XLI Rule 31 of the Code of Civil Procedure?

d) Was the court below justified in remanding the case to the trial court?

10. **Question of law (a)**: In Ext.B6 representation submitted by the plaintiff and two others including his son Jaison Joseph, it is stated thus:

> "But the members' list forwarded to the Bar Association, Aluva from the Bar Council, our names are not included in the list. So we are not allowed to cast our votes in Bar Council election."

It was also stated in Ext.B6 that these facts were brought to the notice of

the polling officer and a request was made to him to allow the plaintiff to exercise his franchise. A petition was submitted to the polling officer and that petition was also enclosed with Ext.B6. In the petition submitted to the polling officer, it is stated in clear terms thus:

> "But today, when we came to the election booth for voting our names are not included in the list of members issued from the Bar Council office. So, we are denied the right to vote."

On a reading of Ext.B6 and the petition submitted by the plaintiff to the polling officer, it is clear that even according to the plaintiff, his name was not included in the electoral roll. It is trite that a person whose name is not available in the electoral roll is not entitled to exercise his franchise.

11. It has come out in evidence that two advocates having the name Joseph were available in Aluva Bar Association. They are, O.V.Joseph, the plaintiff and C.V.Joseph, who died on 12.11.1999. At the time when Ext.B3 notification, dated 25.9.1999 was issued by the Bar Council of Kerala, calling for objections against the preliminary electoral roll, C.V.Joseph was alive. Against Sl.No.505 in Ext.B5 electoral roll, in the columns pertaining to serial number, roll number, name, address and the date of enrollment, the following entries are seen.

"505, K/000300/1962, Joseph C.V., Alwaye, 22.11.1962."

Therefore, it is clear that voter in Sl.No.505 is C.V.Joseph and not the plaintiff O.V.Joseph. It is true that as against the column of roll number and date of enrollment, the details in respect of the plaintiff O.V.Joseph are shown. That does not entitle the plaintiff to exercise his franchise. Had C.V.Joseph been alive on the date of election and had he appeared before the polling officer to exercise his franchise, the latter could not deny him his right to vote as the name of C.V.Joseph was available in the electoral roll. The polling officer is bound to see whether the name of the voter concerned is available in the electoral roll. The other details need not be looked into by him nor is he bound to consider the question of identity where the identity of C.V.Joseph was not in dispute. Only when identity of a voter, whose name is entered in the electoral roll, is in dispute, the polling officer could look into the other details. The case put forward by the plaintiff is without any substance. The plaintiff himself was aware that his name was not included in the electoral roll. He submitted a representation to the Chairman of the Bar Council and to the polling officer stating that there was an omission to include his name in the electoral roll. Having taken such a stand, the plaintiff cannot be permitted to take a contrary stand to found a claim against the second defendant, the polling officer.

12. It is well settled that the entries found in the electoral roll are

final and they are not open to challenge in an election petition. The correctness of the electoral roll cannot be gone into by the court in such proceedings. Vide: **Pampakavi Rayappa Belagali** V. **B.D. Jatti and others:** A.I.R. 1971 S.C. 1348; **Inderjit Barua and others** V. **Election Commission of India:** A.I.R. 1984 S.C. 1912; **Kabul Singh and others** V. **Kundan Singh**: A.I.R. 1970 S.C. 340; **Hariprasad Mulsankar Trivedi** V. **V.B.Raju and others**: (1974) 3 S.C.C. 415; **Shyamdeo Pd. Singh** V. **Nawal Kishore Yadav:** (2000) 8 S.C.C. 46; **Nripendra Bahadur Singh** V. **Rai Ram Verma and others**: A.I.R. 1977 S.C. 1992.

13. Though the decisions referred to above arose while interpreting the provisions of the Representation of People Act, the same principles would be apply in cases like this as well, when it comes to the question of finality of the voters list. The Polling Officer was not bound to entertain the request of the plaintiff to allow him to vote when his name was not found in the voters list. The plaintiff was not entitled to institute the suit against the second defendant claiming damages. The lower appellate court was not justified in holding that the plaintiff is entitled to claim damages and that the second defendant is liable for the same.

14. **Question of law (b)**: The trial court, on a consideration of the evidence as a whole, held that the plaintiff failed to prove his identity before the polling officer and no attempt was made by him in that behalf as contended in his pleadings. The trial court took that view after considering all the relevant facts and circumstances of the case, including

Ext.B6, in which it was admitted by the plaintiff that his name was not included in the final electoral roll. The trial court, on facts, held that the name of the plaintiff was not included in the electoral roll and the second defendant was justified in not allowing the plaintiff to cast his vote. The lower appellate court held that the plaintiff has stated in his proof affidavit that he attempted to establish his identity before the polling officer and, therefore, the trial court was not right in holding against the plaintiff. The proof affidavit filed by the plaintiff, in lieu of chief examination, would not constitute a substitute for consideration of the entire evidence. Proof affidavit is allowed to be filed in lieu of chief examination, after the amendment of the Code of Civil Procedure by the Amendment Acts of 1999 and 2002. A mere statement by the plaintiff in his chief examination, reiterating the case put forward by him in the plaint, cannot be taken as proof, without reference to the evidence elicited in his cross examination and other relevant evidence in the case. In the present case, PW2, the witness examined on the side of the plaintiff, who was a senior member of Aluva Bar, stated in clear terms that the second defendant only stated that the name of the plaintiff was not there in the voters list and that the second defendant did not say anything to insult the plaintiff. The court below was not justified in considering a stray sentence in the proof affidavit filed by the plaintiff to hold that there is enough evidence in support of the case of the plaintiff. This finding was arrived at by the court

below without reference to clinching documentary evidence and the evidence of DW2, the second defendant. A party to a suit would put forward his case in the pleadings. It is easy for him to state anything in the pleadings and also in his chief examination. There is no difficulty for him to repeat what he has stated in the pleadings, in the proof affidavit or in the chief examination before court. Acceptability or otherwise of the case of the said party is to be considered and tested with reference to answers in the cross examination of that party as well as the other evidence in the case. The statements made a party in his chief examination alone could not be considered by the court to hold that a fact is proved, without considering the evidence in his cross examination as well other pieces of evidence. Pleadings by themselves do not constitute proof. So also, mere statements in chief examination, without testing the same in cross examination along with the other evidence, is not a substitute for proof. The court below was not justified in picking holes in the well considered judgment of the trial court by reference to some stray sentences in the proof affidavit of the plaintiff.

15. **Question of law (c)**: Rule 31 of Order XLI of the Code of Civil Procedure provides that the judgment of the appellate court shall be in writing and shall state (a) the points for determination, (b) the decision

thereon, (c) the reasons for the decision, and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled. Sub Rule (2) of Rule 30 of Order XLI states that where a written judgment is to be pronounced, it shall be sufficient if the points for determination, the decision thereon and the final order passed in the appeal are read out and it shall not be necessary for the Court to read out the whole judgment. Rule 31 mandates that the Appellate Court shall formulate the point for determination. A decision has to be arrived at on the point for determination. Decision and the reasons for the decision should be stated with reference to the points for determination. The court below has not raised any point for determination in the present case. The narration of facts and a conclusion without formulating the points for determination do not satisfy the requirement of Rule 31. How could such a judgment be read out as provided in sub-rule (2) of Rule 30? Rules 30 and 31 would indicate that it is mandatory for the Appellate Court to formulate the points for determination. Appellate Court is bound to decide whether the judgment passed by the trial court is correct or not. Such an exercise would be fruitful only when the points for determination are formulated and a decision is rendered with reasons for the decision. Without formulating the points for determination, there cannot be any effective and complete adjudication of the questions involved in the appeal. Rule 31 of Order XLI clearly indicates the necessary

requirements for a judgment of the Appellate Court. In the present case, the court below was not justified in not raising the points for determination and in not complying with the other requirements of Rule 31.

16. **Question of law (d)**: The lower appellate Court has remanded the case to the trial court not because that the plaintiff was denied an opportunity to adduce evidence. The plaintiff has no case that he was denied an opportunity to adduce evidence. The court below has remanded the case only on the ground that from the available evidence on record, the court is unable to fix the quantum of damages. It is also stated that in order to award damages, some more evidence is required and an opportunity should be provided to the plaintiff for that purpose. A remand of the case cannot be made for the purpose as stated by the court below. A remand could be made in any of the contingencies mentioned in Rules 23, 23-A and 25 of Order XLI of the Code of Civil Procedure. The requirements of these rules are not available in the present case. A remand for the mere purpose of enabling a party to adduce more evidence cannot be made unless there are other compelling circumstances for such a remand.

17. For the aforesaid reasons, I am of the view that the court below was not justified in holding that the plaintiff is entitled to get damages from

the second defendant and that the second defendant is liable for the same. In view of the finding that the plaintiff is not entitled to claim damages, it is also not necessary to remand the case to the trial court. The judgment passed by the court below is set aside and the judgment and decree of the trial court are restored.

The Regular Second Appeal and the First Appeal against Order are allowed as above.

(K.T.SANKARAN)
Judge

ahz/